

## **The Bedford Park Society**

*The paper which follows is a slightly adapted version of the paper on which the Executive Committee based its decision to recommend the conversion of the Society into a Charitable Incorporated Organisation. It was prepared in late 2019.*

### **Charitable Incorporated Organisations – a paper for the Executive Committee**

The Executive Committee wishes to examine whether there would be advantages in converting the Society into a Charitable Incorporated Organisation (CIO), a corporate structure created by the Charities Act 2011 specifically for charities.

This note outlines the implications of the Society's current structure and compares it with a CIO and the alternative corporate structure, a company formed under the Companies Act. Inevitably it can only be a summary of the relevant issues.

#### **A. Our current structure – An unincorporated association**

The Bedford Park Society is a charity registered under the Charities Act. It is an unincorporated association set up with charitable purposes, holding its assets on a charitable trust.

Unpicking that, this means:

- The Society is a 'club' with a rolling body of members, being those people who pay an annual subscription.
- As an unincorporated association it is not recognised as an entity separate from its members and management.
- The Society cannot sue or be sued in its own name.
- When the Society enters into contracts, this is an act of the signatory acting on behalf of the members and management.
- The Executive Committee are the Society's charity trustees and have duties in law to operate the Society in furtherance of its charitable purposes.
- The charity trustees are the legal owners of the assets of the Society held on trust for charitable purposes.

#### **Liability of members**

In principle, members of an unincorporated association are liable for its liabilities. A **member's** liability in a society like the BPS would usually be held to be limited to the amount of the member's subscription, since that is the clear intention of membership. Members could be liable if it can be shown that they authorised or ratified a contract or some other liability.

#### **Liability of trustees**

The officers and other trustees of a charitable association can have liability:

- as signatory to contracts and other legal obligation entered into on behalf of the charity
- similar joint liability for acts approved by the committee and for acts of other officers and trustees
- liability as trustees in law and as charity trustees under the Charities Act
- for personal wrongdoing eg negligence, recklessness, defamation etc.

#### **Protection**

Under the Society's constitution a trustee is entitled:

- to be reimbursed for reasonable expenses properly incurred when acting on behalf of the Society
- to be indemnified out of the assets of the Society against any losses incurred by him in the absence of negligence or fraud and
- to benefit from trustee indemnity insurance cover purchased at the Society's expense under section 189 of the Charities Act 2011.

It is unlikely that the members of the Society would be liable to indemnify the officers and trustees.

### **BPS's activities**

In practice the current activities of the Society provide little cause for concern and the issue of trustee liability is unlikely to arise.

- commenting on planning applications
- liaising with the Councils and other bodies on infrastructure and development plans
- organising lectures and events
- handling the Society's charitable funds and complying with charity law.

Nonetheless the fact of trustee liability and its association with the unincorporated association could dissuade potential trustees from joining the committee and this is likely to become more of a factor as CIO's become the predominant form for charities.

In the longer term, if the Society expands its activities, a legal entity would be helpful for entering into contracts:

- employing people to administer the Society,
- larger, higher value contracts for events or activities,
- buying or leasing premises or other longer-term assets/liabilities.

We could even now set up a limited liability company as a 'subsidiary' of the BPS.

Commencing litigation on a planning matter is something that the Society has in the past contemplated, though it is a step they are unlikely to take in the context of the current planning legislation and procedures. However, the Society maintains a fighting fund for planning matters. Nevertheless, the risks of any legal action are likely to seem daunting to the trustees of an unincorporated association.

In conclusion, there is probably little to be concerned about at present, but a limit of liability would always be comforting and have advantages.

### **B. Charitable Incorporated Organisations**

CIOs were introduced by the Charities Act 2011. The simplest way to think of a CIO is as similar to an unincorporated association except that it is a corporate body with its own legal personality. A CIO is not a company under the Companies Act.

The key attractions of a CIO are:

- there is a clear limit on members' liability as members of the corporate body
- the corporate entity enters into contracts and other obligations as principal, so signatories do not incur personal liability
- it can own its own assets, and has a continuing existence
- the reporting requirements are less than for a Companies Act charitable company (see below).

#### ***Membership of a CIO***

A CIO may be either:

- an association CIO, appropriate for charities with an active body of members who vote on important decisions, such as electing trustees or committee members; or
- a foundation CIO, whose only voting members are its trustees.

We would be an association CIO.

The members may be either (a) not liable to contribute to the assets of the CIO, if it is wound up, or (b) liable to do so up to a maximum amount each (eg £5).

Each **member** of a CIO has a statutory duty to exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO. This new obligation is presumably to prevent members mandating activities beyond the charity's charitable purposes. It would have to be drawn to members' attention.

#### ***Trustees of the CIO***

The CIO has charity trustees, who are to manage the affairs of the CIO and may exercise all the powers of the CIO.

Each trustee of the CIO has a statutory duty to exercise the powers he has in that capacity in the way that the trustee decides, in good faith, would be most likely to further the purposes of the CIO.

Each trustee must exercise such care and skill as is reasonable in the circumstances, having regard in particular:

- to any special knowledge or experience that the trustee has or purports to have, and
- where the trustee is a professional or is in business, to any special knowledge or experience that it is reasonable to expect that a person acting in that kind of profession or business to have.

There are usual rules as to disclosure of trustees' material interests and trustees not personally benefitting from contracts. A trustee is entitled to be reimbursed for expenses properly incurred.

Trustees of CIOs can be criminally liable for fraudulent trading by the CIO. A CIO appears to be an 'unregistered company' (like the Society at present) under insolvency legislation and trustees as now can be civilly liable for 'wrongful trading' if the CIO incurs liabilities when there was no reasonable prospect of meeting them.

### ***Conversion and registration***

It is possible for an existing unincorporated society to convert to become a CIO.

A CIO must have (a) a constitution, (b) a principal office and (c) one or more members.

The name of the CIO must include the initials CIO (or the full words 'charitable incorporated organisation'). Alternatively, this would have to be made clear in all locations, documents, communications and conveyances.

The Charity Commission registers the CIO as a charity in the register of charities, noting that it is constituted as a CIO.

### ***Constitution of CIO***

A CIO's constitution must be in the form specified in regulations made by the Commission, or as near to that form as the circumstances admit. Our existing constitution is not close enough. However, the revised constitution will be able to track closely the content of the existing constitution.

A CIO may amend its constitution in the usual way. The usual rules for CC consent apply, especially regarding changes in the objects of the charity, the application of property on a dissolution and regarding any personal benefit being obtained by trustees or members and avoiding conflicts of interest.

### ***Transfer of assets***

Once we have set up and registered a new CIO, the old BPS would transfer its property and operations to the CIO. The dissolution clause in our existing constitution allows for this. We do not have any permanent endowment, which would complicate a transfer. Once the transfer had taken place the members would need to meet to give their approval to the constitution of the new CIO.

### ***Accounts***

A CIO is not a company under the Companies Act, so the reporting requirements are simpler than for charitable companies. CIOs must produce accounts under charity law, not company law, so we would see little difference.

### ***Registers, office and meetings***

A CIO must keep registers of its members and trustees, with similar formalities as for a Companies Act company, including being open for inspection at a named location. But the members' list

doesn't have to be filed at Companies House. We will probably need to formalise membership procedures such as renewals. A CIO must hold a general meeting of its members.

### **Mortgages**

To simplify the CIO framework, there is currently no provision for a register of mortgages and charges over the CIO's property. For a larger charity, such as the Victorian Society, that could constrain their borrowing capacity.

### **C. Companies Limited by Guarantee**

The traditional alternative to the unincorporated charity has been to set up a company limited by guarantee, formed under the Companies Acts (CLG). For completeness it is worth outlining some features of a CLG.

Briefly:

- a CLG has members, whose liability for its obligations is limited to the amount of a nominal guarantee (eg £5) that each member gives within the CLG's constitutional documents.
- the CLG's members have voting rights and elect the CLG's directors.
- the CLG's directors are its trustees under the Charities Act.
- like a CIO, the CLG can own property in its own right, is liable for its own debts, transact its own business, employ staff in its own name and borrow money.
- unlike a CIO, the CLG can register a floating charge over its property.
- a charitable CLG is regulated both by the Charity Commission and under company law. It must make returns to both the Charity Commission and Companies House.
- Unlike a CIO, it must comply with the full requirements of the Companies Acts. Its annual return includes a list of members on public record.

### **Liability of Directors of a CLG**

The directors of a CLG, like those of any company, may have personal liability:

- They have a duty to use reasonable skill and care, as for the CIO.
- They have further statutory responsibilities under the Companies Act.
- As directors of a charity, they have the same statutory duties under the Charities Act as trustees of a CIO.
- Like CIO trustees, directors can be liable for fraudulent and wrongful trading by the CLG. Insolvency legislation applies in a different way to a CLG.
- The company is entitled to give the directors an indemnity for certain acts and to fund insurance for other liabilities where the director is exonerated.

### **Drawbacks and advantages**

The principal advantage of a CLG - for larger charities - is that it is a well-understood structure compared with a CIO. This will make it easier to enter into contracts, loans and other transactions.

The compliance requirements of company law are additional and more formal than charity compliance. There are audit or review requirements of the company's accounts. These obligations are, however, easily managed. The greater formality is a comfort to third parties. Details of the directors of a CLG have to be filed at companies House. This sits somewhat uncomfortably with the more informal nature of many charities.